

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1147

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

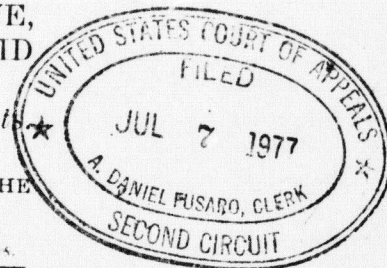
Appellee,

v.

RICHARD RIZZO, NICHOLAS BOTTA, LAWRENCE
MESSINA, JOHN YARMOSH, JOHN IANNONE,
IRVING ALBAHARI, JOSEPH FALCO, DAVID
STEINBERG,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.



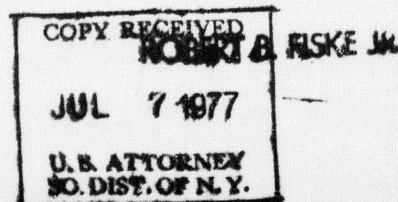
PETITION FOR REHEARING AND PETITION FOR REHEARING
EN BANC FOR DEFENDANTS-APPELLANTS, JOHN IANNONE AND
IRVING ALBAHARI

IRVING ANOLIK

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(1631)



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
Docket No. 77-1147
-----x

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN IANNONE and IRVING ALBAHARI,

Defendants-Appellants.

-----x
PETITION FOR REHEARING
AND PETITION FOR REHEAR-
ING EN BANC

Petitioners IANNONE and ALBAHARI respectfully petition Honorable Circuit Judges Mulligan, Gurfein and Van Graafelland, for a rehearing and reconsideration of their decision of July 1, 1977, affirming the judgment of the District Court, Southern District of New York, convicting the abovenamed appellants of conspiracy and of a violation of 18 U.S.C. 1955.

In the event this Panel ultimately adheres to its present position, we suggest that this petition and the original briefs be circulated among all of the Judges for consideration en banc.

We incorporate, by reference, the original briefs submitted to this Court on the original argument.

The grounds for a rehearing are as follows:

1. Irrespective of the fact that counsel for ALBAHARI may have known of the superceding indictment against ALBAHARI, we maintain that the failure of the Trial Court to arraign ALBAHARI on that true bill was a jurisdictional defect in that the Court therefore never acquired jurisdiction to try ALBAHARI.

In addition, the record does not disclose whether ALBAHARI himself was aware of the superceding indictment. If the rule is going to be that a person can be tried on an indictment upon which he has never been arraigned, merely because his lawyer heard something about an indictment coming down, then the Court might just as well arraign lawyers instead of the clients.

We believe that the failure to establish that ALBAHARI himself was aware of the new indictment is in itself sufficient to warrant reversal. The Fifth Amendment precludes trial for a felony without indictment and, therefore, without an arraignment, ALBAHARI could

not have been apprised of the charges or of the indictment.

2. The failure of the Trial Court to instruct the talismen as to whom the "five or more" persons were in connection with the 18 U.S.C. 1955 violation, was also a jurisdictional prerequisite which this Court should have determined as a matter of law.

It was obvious that the jurors, therefore, could not possibly have found the same five people by unanimous vote. The law of chance alone virtually precludes this. (UNITED STATES v. NATELLI, 527 F.2d 311 (2 Cir. 1975), cert den.)

3. We have previously, and now again, adopt the grounds urged by co-appellant Yarmosh, with respect to his point on UNITED STATES v. DONOVAN, (S.Ct. 1/18/77), namely, that the Court used pre-Donovan standards in its approach on the electronic surveillance, and we believe post-Donovan standards should have been employed.

4. We submit that the evidence clearly revealed a fatal variance since more than one conspiracy was involved.

We ask the Court to reconsider the foregoing and grant a rehearing, and also as It to grant a rehearing on the other points set forth in the original brief.

CONCLUSION

The petition for rehearing, or, in the alternative, a rehearing en banc, should be granted.

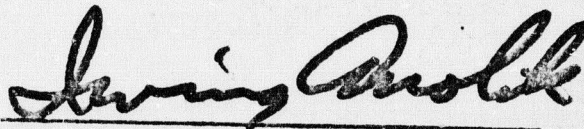
Respectfully submitted,


IRVING ANOLIK
Attorney for Appellants
ALBAHARI and IANNONE

CERTIFICATION OF GOOD FAITH

The foregoing is submitted in good faith and not for the purpose of delay.

DATED: July 6, 1977.


IRVING ANOLIK